

## **Opinion No. 57-93**

May 8, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilario Rubio, Assistant Attorney General

**TO:** The Honorable David C. Montoya, State Representative, San Miguel County, Las Vegas, New Mexico

### **QUESTIONS**

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1. Legally can a state representative hold a county job?
2. Legally can a state representative hold a municipal job?

#### CONCLUSIONS

1. Yes.
2. Yes.

### **OPINION**

#### ANALYSIS

A state representative is a state officer, hence I find two sections of our New Mexico Statutes Annotated, 1953 Compilation, pertinent to your two questions.

Section 2-1-4, N.M.S.A., 1953 Comp., reads as follows:

"From and after January 1, 1945, it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature."

Section 2-1-5, N.M.S.A., 1953 Comp., reads as follows:

"From and after January 1, 1945, it shall be unlawful for any officer of the state of New Mexico to pay to any member of the legislature compensation for services rendered the state of New Mexico as an officer or employee thereof during the term for which such legislator was elected except such compensation and expense money which such member is entitled to receive as a member of the legislature."

The two above quoted sections specifically concern and refer to state officers or state employees.

From the language of the above quoted sections, it is observed that it pertains only to officers or employees who are officers or employees of the state. A state representative, when working for a county office is a county employee paid by county funds, when working for a municipal office he is a municipal employee and paid out of municipal funds. Therefore, a state representative, working as a county employee is not an employee paid out of state funds; or when working as a municipal employee is not an employee paid out of state funds. Source of payment of salary alone, of course, is not the sole test. The duties, both as a county employee and as a municipal employee, would be purely local in character.

That the legislature did not intend to cover purely local employees hired by county or municipal officers is specifically spelled out in § 2-1-5, N.M.S.A., 1953 Comp., wherein it is made unlawful for a state officer to pay a member of the legislature, and does not include payments by county or local offices. Section 52, Vol. 81 of C.J.S., page 969, under "State Officers" defines state officers as follows:

"In the more restricted sense, the term 'state officers' is limited to such officers as exercise a delegated portion of the sovereign power of the state. Broadly speaking, a state officer is one holding an office established by the constitution or by legislature, his powers and duties are coextensive with the state, and he is paid by the state."

Art. IV, Sec. 28 of the New Mexico Constitution reads as follows:

"No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall be within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term."

This provision prohibits any member of the legislature from being appointed to any civil office in the State of New Mexico now or created, or the emoluments of which were increased during such term. However, it does not prohibit the appointment of a member of the legislature as an employee of a county or municipality as distinguished from a county or municipal officer. Question whether position in an office is dependent upon the nature of the job itself.

I have also found two cases which are in point. The case of **Dietrich v. Brickey Judge et al**, 37 SW2d 428, is a case involving a state officer. The Supreme Court of Missouri said:

"However, we have construed the words 'state officer' as meaning such officers whose official duties are coextensive with the boundaries of the state, excluding those officers whose functions are confined to counties and townships" (citing several cases). "By analogy and precedent it is evident that a county treasurer is not a state officer within the meaning of Section 12 Article 6 of the Constitution, so as to invest this court with jurisdiction by virtue thereof."

The case of **Souder v. City of Philadelphia Police Pension Fund Association**, 25 Atlantic 2d, 191, involves the question of whether Souder was an employee of the state while in the employ of the Delaware River Bond Commission. The Supreme Court of Pennsylvania said:

"While a city, county or other municipal corporation is also the agent of the Commonwealth, invested with certain subordinate governmental functions for reasons of convenience and public policy" (citing several cases) "it cannot be reasonably argued that those employed by such municipalities are employees of the State."

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